

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 19, 2007

STATE OF TENNESSEE v. EDWARD EUGENE SWAFFORD, Sr.

Appeal from the Criminal Court for Davidson County
No. 2005-C-2282 Steve Dozier, Judge

No. M2006-01672-CCA-R3-CD - Filed September 5, 2007

The Defendant, Edward Eugene Swafford, Sr., pled guilty to driving under the influence but reserved the right to appeal a dispositive certified question of law pursuant to Tennessee Rule of Criminal Procedure 37(b)(2)(A)—whether his arrest was supported by probable cause. We conclude that there was probable cause to arrest the Defendant and that therefore the trial court did not err in denying his motion to suppress evidence obtained after he was arrested. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Emma Rae Tennent, Assistant Public Defender, Nashville, Tennessee, for the appellant, Edward Eugene Swafford, Sr.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Kristen Shea, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At 11:30 p.m. on October 6, 2004, Officer Michelle Steidl of the Metropolitan Nashville Police Department stopped the Defendant (who was traveling westbound in his vehicle on Interstate 24 in Davidson County) and arrested him for driving under the influence (DUI). After the arrest, Officer Steidl administered field sobriety and breathalyzer tests, which indicated he was intoxicated. Subsequently, the Defendant filed a motion to suppress the results of the tests, arguing that this evidence was inadmissible because probable cause did not exist for Officer Steidl to make the arrest.

The trial court held a suppression hearing at which Officer Steidl and the Defendant were called as witnesses.

Officer Steidl testified that she was “running radar” when her radar gun indicated that the Defendant’s vehicle was traveling at “eighty-three” miles per hour in a “fifty-five” mile per hour zone. She initiated a traffic stop and pulled her police car behind the Defendant, who “continued traveling at a high rate of speed” and “seemed oblivious” that she was behind him, with “the lights and the siren, [and] the spotlight” activated. Both vehicles were “in the center lane and [the Defendant] . . . made no indication to move over.” She followed the Defendant’s vehicle for “roughly two miles, maybe three, three-and-a-half minutes.”

According to Officer Steidl, as she followed the Defendant, he did have an opportunity to pull over because there was a “wide shoulder on the right-hand side” and “two other exits prior to the one he took” at Shelby Avenue. She admitted on cross-examination however that the Defendant had passed the first exit before her vehicle caught up to him and that he had passed the second exit before she activated the spotlight. Officer Steidl also confirmed that, near the second exit, the Defendant’s vehicle was blocked from exiting by a “semi” truck. Officer Steidl “called [d]ispatch” and informed that the subject was “slow, if not refusing, to stop.” However, the Defendant did eventually exit at Shelby Avenue, proceeded through one traffic light, and entered an Exxon parking lot where he stopped his vehicle.

At that time, she approached the Defendant’s vehicle and his window was rolled up and his door closed. When she motioned for him to roll down his window and unlock his door, “he fumbled with the door mechanism,” although the door and window did not appear to be broken or faulty. The Defendant simply had “difficulty with the mechanism.” Once he unlocked the door, she opened it for him and then noticed “that there was an immediately apparent odor of alcoholic beverage emitting from him.” Officer Steidl testified that, at that time, the Defendant admitted to having consumed alcohol.

She asked the Defendant to produce his driver’s license and “[h]e fumbled about it for quite a time.” She also noticed that the Defendant was “kinda bleary-eyed” and “had a vacant stare” as she interacted with him. Officer Steidl asked him to “go ahead and step [out of] the vehicle” but stated that she “probably” had to ask him more than once before he complied. She “assisted him [out of] the vehicle” and needed to use additional strength “in trying to control him.” Officer Steidl stated that the Defendant “continued to bow up” towards her and that she then handcuffed the Defendant as a safety precaution. She did not instruct him that he was under arrest but testified that she does commonly handcuff any person that she places in the backseat of her car. Officer Steidl explained that she did not include the details of the Defendant “bowing up” in the arrest paperwork because he was not charged with any offense related to that.

Once other officers arrived at the scene and the Defendant’s mood became more “jovial[.]” the Defendant agreed to “try” the field sobriety tasks, and his handcuffs were removed. Officer Steidl administered the “standard three” field sobriety tests, and the Defendant performed “less than

satisfactorily.” At this point, Officer Steidl again placed the Defendant “in the backseat of [her] car” and “read him the Implied Consent Law.” She waited “twenty-one minutes” and then administered a “breath test[.]” She explained that her breathalyzer machine—the “Intoxilyzer Fourteen-Hundred”—did not require that twenty minutes pass before it could be operated but that she did not ever administer the breath test until she heard the “bing, bing, bing” noise alerting her that the time had passed. The Defendant registered .16 on the breath test.

Officer Steidl testified that the Metropolitan Nashville Police Department “recommended” but did not require that officers videotape DUI stops and then “flip the view to the backseat view” during the “observation period and breath test.” The rearview camera was not required because it often only showed the officer’s shotgun rack and did not show the suspect clearly.

The Defendant testified that he “was initially in the far left lane” when Officer Steidl activated her blue light, and he “couldn’t pull over . . . right then” because there was “traffic.” He “pulled over in front a [sic] the tractor-trailer[.]” but he “didn’t know she was behind [him].” When Officer Steidl pulled over as well, he “knew she was behind [him].” He testified that he then took the first exit after he realized Officer Steidl was attempting to stop him, which was Shelby Avenue. He did not stop on the shoulder of the interstate because he had “[s]een the police videos, people get hit on the side a [sic] the road. There’s officers that’s gotten run over, giving tickets on the side a [sic] the street.” He “just felt it was safer, to pull . . . off the highway, than just be on the edge or—you know—for my sake and hers, also.” He stated that he was not attempting to evade arrest.

The Defendant testified that, when Officer Steidl approached his vehicle, he had disconnected his seatbelt and was trying to retrieve his wallet from his back pocket. He explained that all of his pants “have the buttons on them” and that he “couldn’t get it out right then.” According to the Defendant, when Officer Steidl got to his vehicle, “she was yelling and screaming at me, ‘Get outta the car. Get outta the car.’” The Defendant replied, “I’m not gonna get outta this car yet” because he didn’t “even know what’s going on.” The Defendant stated that Officer Steidl then “shined a light” on him and it “kinda startled” him “cause she seemed a little bit more excited . . . that she shoulda [sic] been for, maybe, a speeding ticket or something.” He testified that he felt it was “just something—she shouldn’t a [sic] been that intense on it.”

He stated that he kept attempting to get his wallet out of his buttoned pants pocket and Officer Steidl “was just wanting [him] to get out.” He then opened the car door so he “could stick [his] leg out” and unbutton his pants pocket, when Officer Steidl “grabbed” and handcuffed him. He stated that he “tensed up” because he “didn’t know what was going on.” He testified that he was not “fumbling” with the door mechanism and did not have a “vacant stare.”

The Defendant stated that, at this point, he was under Officer Steidl’s control, and he did not feel he had “any real choice” about performing the field sobriety tests. The officers told him that, if he “didn’t comply, they was gonna [sic] take [him] and [his] car to jail,” and he told them he was “not gonna [sic] pass it” because he had a “rare skin disorder” on his foot. He said he had “nerve

damage,” he was having surgery for it in two weeks, and that he had the “paperwork and everything.” The condition hindered his ability to stand and required him to “step more gently.”

The Defendant also testified that Officer Steidl did not wait twenty minutes before administering the breath test; according to him, there was a delay of only five or ten minutes. When he first blew into the breathalyzer, “the beep didn’t go off[,]” and Officer Steidl told him that he was not “blowing hard enough” and to “[b]low in it again.” He complied. However, “[i]t didn’t go off[,]” and then she became “really mad.” He stated that Officer Steidl had the “breath thing in [his] face” and that the other officer beside him was “yelling at me, screaming, ‘Blow harder. Blow faster. . . . you don’t do this, we’re gonna take you and your car to jail.’” He then “blew till [he] almost passed out” because he felt that he “didn’t really have a choice.”

On cross-examination, the Defendant admitted that he had consumed one “Seagram’s green-apple cooler” before driving that night. The Defendant explained that he was taking pain medication for his foot condition, which his doctor had told him not to mix alcohol with, but that “a cooler wouldn’t . . . have no adverse effects on it [sic], given” [his body size]. He denied ever telling the officers, “Work with me here. I’ve had a few beers.”

Following the suppression hearing, the trial court entered a written order denying the motion and finding that probable cause existed for Officer Steidl to arrest the Defendant for driving under the influence when he was first placed in handcuffs:

The basis of the [D]efendant’s suppression motion is that Officer Steidl lacked probable cause to effectuate an arrest of the [D]efendant for driving under the influence. The [D]efendant asserts that at the time of the stop of the [D]efendant’s vehicle, there [were] no articulated facts that would have given Officer Steidl probable cause to believe that the [D]efendant was intoxicated while operating a motor vehicle near the entrance of Shelby Avenue and Interstate 24 in Nashville-Davidson County, Tennessee.

Officer Steidl testified that on the aforementioned date, she was working in a patrol capacity on Interstate 24 near the exit ramp of Jefferson Street in Nashville-Davidson County[.] While observing traffic, the officer observed a vehicle pass by in a middle lane going eighty three (83) miles per hour in a posted fifty five (55) mile an hour zone. The officer initiated her blue lights and immediately proceeded to catch up with the [D]efendant. According to the officer, the [D]efendant would not stop his vehicle for over a three (3) mile stretch of interstate. The [D]efendant passed the Jefferson Street exit and James Robertson Parkway exit before exiting onto Shelby Avenue. Once the [D]efendant exited onto the exit ramp, the [D]efendant proceeded through a stop sign until coming to a complete stop at a gas station near Shelby Avenue. Once the [D]efendant was stopped, the officer approached the vehicle and requested the [D]efendant to open the door. The officer testified that the [D]efendant fumbled with the control on the door and had a “vacant stare.” Once the

door was open, the officer noted the strong smell of alcohol. When the officer asked the [D]efendant whether he had consumed any alcohol, the [D]efendant stated that he “had some.” According to the officer, she removed the [D]efendant for safety reasons and placed him in handcuffs and in the back of her patrol car. The [D]efendant avers that he did not want to stop on the shoulder of the interstate for safety reasons. The [D]efendant testified that once the officer approached, the officer started screaming. The [D]efendant stated that he only did the field sobriety tests to keep the tensions down and that he appeared to be unsteady on his feet due to a diagnosed foot disease. The [D]efendant also asserts that twenty (20) minutes did not elapse before the officer conducted the breath-alcohol test but only ten to fifteen minutes elapsed.¹ The issue before the [c]ourt is whether any and all evidence seized by the arresting officer on July 24, 2004, including the blood-alcohol content of the [D]efendant’s blood, is subject to suppression in accordance with the United States and Tennessee constitutional bans on unreasonable searches and seizures due to the officer lacking probable cause to effectuate an arrest.

The [c]ourt will initially point out that there is no argument that once the [D]efendant was placed into handcuffs, the [D]efendant was under arrest for constitutional purposes. In Tennessee, an arrest is defined as the “taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by an act which indicates an intention to take him into custody.” West v. State, 425 S.W.2d 602, 605 ([Tenn.] 1968). The issue the [c]ourt must determine is whether the arresting officer had probable cause to make an arrest for driving under the influence.

Probable cause has been defined as “reasonable ground for suspicion, supported by circumstances indicative of an illegal act.” State v. Hemming, 975 S.W.2d 290, 294 (Tenn. 1998). In the [c]ourt’s opinion, there can be no doubt that the officer had probable cause to arrest the [D]efendant for driving under the influence. The [c]ourt has reviewed the videotape submitted as an exhibit and notes that the [D]efendant’s vehicle can be seen driving at a pace obviously faster than surrounding vehicles. Once the officer initiated her emergency equipment, the [D]efendant can be seen traveling past two exit ramps (Jefferson Street and James Robertson Parkway) before exiting onto Shelby Avenue. The [c]ourt must credit the testimony of Officer Steidl that once the officer had the [D]efendant open the door, the obvious smell of alcohol was present. This, coupled with a “vacant stare” and unsteadiness on the [D]efendant’s feet gives rise to probable cause to effectuate an arrest of the [D]efendant for driving under the influence notwithstanding subsequent breath and field sobriety tests notwithstanding the failure to arrest the [D]efendant for fleeing an arrest. The [D]efendant’s assertions, including a debilitating foot disease, is an issue that he can present to a jury for determination of the ultimate issue. The [c]ourt credits the officer’s testimony as to the twenty (20) minutes

¹ We note that the Defendant’s testimony actually stated that he believed only five to ten minutes elapsed.

observation period rather than the [D]efendant's version who admittedly had been drinking. Therefore, the [c]ourt can not find anything impermissible within the bounds of the United States and Tennessee constitutions that would enable this [c]ourt to suppress the evidence obtained once the officer approached the [D]efendant's vehicle in a constitutionally permissible manner. Therefore, the evidence obtained by metropolitan police officers can be introduced in the State's case-in-chief if it so desires at any subsequent proceedings including trial if the need presents itself.

After his motion was denied, the Defendant pled guilty and was sentenced to serve forty-eight hours in the county jail followed by eleven months and twenty-seven days on probation. He was also fined \$350. However, pursuant to his plea agreement, the Defendant reserved a dispositive certified question of law—whether the trial court erred by finding that probable cause existed to support his arrest and ruling that the evidence procured afterwards was therefore admissible.

Analysis

I. Reservation of Certified Question

The State first argues that this appeal should be dismissed because the question of law was not properly certified. We disagree.

Rule 37(b)(2)(A) of the Tennessee Rules of Criminal Procedure provides that a defendant may appeal from a judgment of conviction entered on a guilty plea if, with the consent of the State and of the court, a certified question of law is explicitly reserved that is dispositive of the case and the following requirements are met:

- (i) [T]he judgment of conviction or other document to which such judgment refers that is filed before the notice of appeal, contains a statement of the certified question of law that the defendant reserved for appellate review;
- (ii) [T]he question of law is stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved;
- (iii) [T]he judgment or document reflects that the certified question was expressly reserved with the consent of the state and the trial court; and
- (iv) [T]he judgment or document reflects that the defendant, the state, and the trial judge are of the opinion that the certified question is dispositive of the case

Tenn. R. Crim. P. 37(b)(2)(A);² see also State v. Irwin, 962 S.W.2d 477, 478–79 (Tenn. 1998); State v. Pendergrass, 937 S.W.2d 834, 837–38 (Tenn. 1996); State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988) (detailing the procedural requirements for reserving a certified question of law for appellate review and the necessity of strict compliance).

The State notes that the certified question of law is not actually stated within the judgment of conviction and that the judgment of conviction does not specifically refer to another document which contains the statement of the certified question of law. See Tenn. R. Crim. P. 37(b)(2)(A)(i). For this reason, the State argues that the certified question is not properly reserved and that this appeal must be dismissed.

The judgment of conviction was entered June 26, 2006, and it contained the notation “Plea Entered with Agreed Certified Question (preserving appeal).” The same day, an additional order was filed which stated that the court, the State, and the Defendant consented and agreed to expressly reserve a certified question as to the propriety of the judge’s order denying the motion to suppress. The order also stated that the State, the court, and the Defendant agreed that the certified question is dispositive of the outcome of the case. It further summarized the trial court’s factual findings from the hearing on the motion to suppress and stated the certified question in terms of whether the trial court erred by denying the motion to suppress.

The Defendant’s petition to enter a plea of guilty was also filed on June 26, 2006. It provided the terms of the plea bargain and stated that the “[p]lea is subject to a certified question, incorporated by accompanying order.”

Thereafter, on July 7, 2006, a “corrective order” was filed in order to clarify the certified question. This order also contained a summary of factual findings and stated that the issue was whether the Defendant’s arrest was supported by probable cause. It specifically stated that it was “incorporated into the judgment” and that it was “entered” on June 26, 2006. It was signed by the trial court, the prosecutor and defense counsel. The notice of appeal was filed July 26, 2006, nineteen days after this “corrective order.”

In State v. Armstrong, 126 S.W.3d 908 (Tenn. 2003), our supreme court clarified that, during the time that the trial court retains jurisdiction over the case, the trial court may take corrective action through supplemental orders to insure that the certified question was properly reserved. Id. at 912–13; see also State v. Bowery, 189 S.W.3d 240, 246–47 (Tenn. Crim. App. 2004). Here, as in Armstrong, corrective action in the form of additional orders was taken prior to the filing of the notice of appeal while the trial court maintained jurisdiction over the case, and the trial court clearly intended the “corrective order” to be retroactively effective to the day the judgment was entered. See

² We note that the Tennessee Rules of Criminal Procedure were revised on July 1, 2006. See Compiler’s Notes, Tenn. R. Crim. P. (2006). These revisions made some slight language changes to this section. For purposes of this opinion, because the substance of the rule under review has not changed, we will cite to the rule in its current form.

Armstrong, 126 S.W.3d at 912–13. In addition, also as in Armstrong, the subsequent order complies with all the reservation requirements of Tennessee Rule of Criminal Procedure 37(b)(2)(A)(ii)-(iv).

Based on our review of the record, we conclude that the requirements for reserving a certified question of law have been met and that this appeal is properly before us. We will thus address the issue on the merits.

II. The Certified Question

The certified question as stated in the “corrective order” is as follows:

In this case, Officer Steidl arrested [the Defendant] immediately after he got out of his vehicle when she stopped him for speeding. The field sobriety tasks and breath tests that followed the arrest were not significantly attenuated and would be fruit of the poisonous tree if the arrest were not supported by probable cause. Thus, the issue is whether, under the Tennessee and Federal [c]onstitutions, this full arrest was supported by probable cause where [the Defendant] was speeding, traveled past two interstate exit ramps after Officer Steidl initiated her emergency equipment before exiting and parking at a gas station, strongly smelled of alcoholic beverage, exhibited a vacant stare, fumbled with the door mechanism, and was unsteady on his feet getting out of the vehicle.

Our supreme court has mandated that, in these cases, “[n]o issue beyond the scope of the certified question will be considered,” Preston, 759 S.W.2d at 650, however, the standard of review for rulings on a motion to suppress is applicable. See Bowery, 189 S.W.3d at 247 (applying the standard of review for a ruling on a motion to suppress in the context of a certified question of law).

When this Court reviews a trial court’s ruling on a motion to suppress, “questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact.” State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). “The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence.” Id. “[A] trial court’s findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.” Id. However, “[t]he application of the law to the facts found by the trial court . . . is a question of law which this court reviews de novo.” State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997). In addition, we review de novo findings of fact from suppression hearings that are based solely on the trial court’s viewing of a videotape. See State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000) (holding that “when a trial court’s findings of fact at a suppression hearing are based on evidence that does not involve issues of credibility, a reviewing court must examine the record de novo without a presumption of correctness.”) (emphasis added).

In its written order denying the Defendant’s motion to suppress, the trial court made five specific findings of fact regarding the events leading up to the Defendant’s arrest: (1) the Defendant

was driving his vehicle “at a pace obviously faster than surrounding vehicles”; (2) the Defendant drove past two exit ramps before exiting onto Shelby Avenue after Officer Steidl “initiated her emergency equipment”; (3) once the Defendant opened the door to his vehicle, there was an “obvious smell of alcohol”; (4) at that time, he had a “vacant stare”; and (5) he was unsteady on his feet. Based on this evidence, the trial court concluded that “there can be no doubt” the officer had probable cause to arrest the Defendant for driving under the influence.

The last three findings of fact were based on Officer Steidl’s testimony. In addition, the trial court also noted in its order that Officer Steidl testified that the Defendant “fumbled” with the car door and that, before he was handcuffed, the Defendant admitted to having consumed “some” alcohol. Because the evidence does not preponderate against the trial court’s findings of fact based on her testimony, we will not question them on appeal.

However, the trial court specifically stated that the first two findings of fact listed above were based on its viewing of the video recording made of the arrest. Therefore, we are required by our supreme court’s holding in Binnette to examine the video evidence and the factual findings made therefrom de novo. Id.

After viewing the video, we agree that the Defendant’s vehicle was traveling down the interstate at a significantly faster speed than surrounding vehicles. It is also clear from the video that the Defendant passed two exit ramps after Officer Steidl had activated her blue lights and pulled in behind him. In fact, approximately thirty-seven seconds passed between the time Officer Steidl was squarely behind the Defendant (with flashing blue lights activated) and the time he indicated that he was aware of her presence by engaging his turn signal and moving into the right-hand lane toward the next exit. The Defendant then stopped at a red light at the end of the exit ramp and—once it turned green—waited over ten seconds before moving across the intersection, where he drove down the wrong side of the road for a short distance before turning left into the gas station where he stopped and sat in his car without rolling down the window or opening his door. Indeed, Officer Steidl was at the Defendant’s window for twenty-one seconds before he opened the door and, at that time, she assisted him out of the vehicle and immediately placed him under arrest by forcing his arms behind his back and putting him in handcuffs.

The question before this Court is whether these facts created probable cause for Officer Steidl to arrest the Defendant.³ This is a question of law this Court reviews de novo. See Yeargan, 958 S.W.2d at 629. The Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution mandate that a warrantless arrest must be supported by probable cause. State v. Bridges, 963 S.W.2d 487, 491 (Tenn. 1997) (citing Beck v. Ohio, 379 U.S. 89, 91 (1964)); see also State v. Lewis, 36 S.W.3d 88, 97–98 (Tenn. Crim. App. 2000). For this purpose, probable cause “exists, if at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are ‘sufficient to warrant a

³ The Defendant does not argue under Terry v. Ohio, 392 U.S. 1 (1968), that Officer Steidl had no reasonable suspicion to stop his vehicle.

prudent man in believing that the [defendant] had committed or was committing an offense.” Bridges, 963 S.W.2d at 491 (quoting Beck, 379 U.S. at 91).

In this case, a prudent officer would be warranted in believing that the Defendant had committed the offense of driving under the influence. Initially, the Defendant was traveling at an excessive rate of speed—eighty-three miles per hour in a fifty-five mile per hour zone. This fact alone provided the officer with sufficient reason to initiate a stop. See, Odean Cooper v. State, No. W2003-01518-CCA-R3-CD, 2004 WL 541157, at *6 (Tenn. Crim. App., Jackson, Oct. 4, 2004). Furthermore, the Defendant passed two exit ramps after Officer Steidl activated her flashing blue lights and spotlight and continued to drive in the irregular manner described above before stopping at a gas station. Then, he failed to open his door or roll down his window for an inordinate amount of time, “fumbled with the door,” and had a “vacant” stare. When the door was finally opened, he smelled of alcohol, was unsteady on his feet, and admitted he had consumed “some” alcohol. These facts created probable cause for Officer Steidl to arrest the Defendant for driving under the influence. As such, we conclude that the trial court did not err in denying the Defendant’s motion to suppress.

Conclusion

Based upon the foregoing reasoning and authorities, the judgment of the Davidson County Criminal Court is affirmed.

DAVID H. WELLES, JUDGE